IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART,

Petitioner,

vs.

MARTIN A. JANIS, Director of the Ohio Department of Mental Hygiene and Correction,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of the State of Ohio (R. 78-88) is reported at 2 Ohio St. 2d 36, 205 N.E. 2d 911 (1965).

Jurisdiction

The judgment of the Supreme Court of the State of Ohio was entered March 31, 1965 (R. 90). The petition for a writ of certiorari was filed April 17, 1965, and was granted October 11, 1965. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

I.

Is a defendant unconstitutionally precluded, in violation of the Sixth and Fourteenth Amendments, from contesting the State's case by cross-examination or by any other means when, in a state criminal prosecution, jury trial is waived and the defendant's court-appointed attorney enters into an arrangement with the judge and the prosecutor whereby the State is relieved of proving defendant's guilt by proof beyond a reasonable doubt and the defendant is barred from contesting the State's case by cross-examination, presentation of evidence, or any other means; the court indicates that the arrangement entered into is one in which "the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it"; the defendant insists that he is "in no way" pleading guilty; the court responds to the defendant's plea by advising him that he may have a jury trial if he wishes to stand trial; the defendant rejects the court's offer of a jury trial on the ground that he had been in the county jail for two months and he "couldn't stand it out there any longer," and then begs to be tried by the court; the court demands an election between a jury trial and an uncontested case; the court-appointed attorney agrees that he will not contest the State's case, and no further exploration of the defendant's views on the question is attempted; a procedure ensues in which none of the State's witnesses is cross-examined, a purported confession of a previously-convicted co-defendant is introduced, and the court-appointed attorney is chastised for "trying the case on the merits" when he objects to proof of an offense not charged in the indictment?

II.

In a non-jury trial, is a defendant unconstitutionally denied his Fourteenth Amendment due process right to have the question of his guilt or innocence determined by an impartial judge solely on the basis of the evidence presented at trial when, despite the defendant's plea of not guilty, the judge, at the outset of the hearing, states that the defendant has admitted his guilt; the judge expressly states that he considers the defendant's failure to testify as evidence of guilt despite the presentation of an unrefuted explanation of the failure to testify which is entirely inconsistent with an inference of guilt; after conviction, the judge excoriates the defendant for exercising his constitutional right to plead not guilty, characterizes the plea as frivolous, asserts that the plea was motivated by an improper desire to seek appellate review, and states that the plea indicates an attitude of unrepentance?

III.

Is a defendant denied adequate notice of the charges upon which he is tried and an adequate opportunity to defend against those charges, and are convictions obtained upon an indictment amended during trial violative of the due process requirements of the Fourteenth Amendment when, in a State criminal prosecution, the defendant is indicted on several counts of forgery and several counts of uttering forged checks; the indictment specifically describes the checks upon which the charges are predicated; the defendant's court-appointed attorney enters a plea to the charges which is deemed by the court to preclude the defendant from contesting the State's case and is further deemed to require the State to establish only a "prima facie case"; the State is unable to produce any evidence to dem-

onstrate that the defendant forged and uttered the checks described in the indictment; and the state is permitted, over defendant's objection, to amend the indictment in the midst of trial by changing the description of the forged checks with respect to number, amount payable, and name of payee?

Constitutional Provisions and Statute Involved

UNITED STATES CONSTITUTION

Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .

Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

Amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATE STATUTE

Ohio Rev. Code §2941.30 (1953):

> The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name

or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

Statement

In an eight-count indictment filed in the Court of Common Pleas of Stark County, Ohio, on March 3, 1961, Doris Mae Jones, Ronald K. Mitchell, and Petitioner were charged with four counts of forgery[1] and four counts of uttering forged instruments[2] (R. 5-9). In a second indictment filed

[1] Ohio Rev. Code §2913.01 (1953).

[2] *Ibid.*

on the same day, Petitioner and Ronald K. Mitchell were charged with breaking and entering[3] and grand larceny[4] (R. 10-11). When arraigned on January 29, 1962, Petitioner entered pleas of not guilty to all charges. Two days later, counsel was appointed to represent Petitioner (R. 12-13). Unable to make bond, Petitioner remained in jail from the time of his arrest.

On March 23, 1962, after Petitioner's co-defendants had been convicted, the indictments in which Petitioner was named were consolidated for trial, written waivers of jury trial were entered, and Petitioner was "tried" by the court (R. 20-21). Petitioner was found guilty on three counts of forgery, three counts of uttering, one count of breaking and entering, and one count of grand larceny. Consecutive sentences of one to twenty years were imposed on each of the forgery counts to run concurrently with sentences on all other counts (R. 14-19).

On October 15, 1964, Petitioner filed a Petition for Writ of Habeas Corpus in the Supreme Court of Ohio (R. 1-3). A Return to Writ was filed by the Respondent below setting forth the judgment of conviction and sentence upon which Petitioner was being held in the London Correctional Institution (R. 4). On November 24, 1964, a hearing was held by the Board of Master Commissioners of the Supreme Court of Ohio. At the hearing Petitioner contended that, at his trial on March 23, 1962, he had been denied the right to confront and cross-examine his accusers, that he had been tried upon charges other than those contained in the indictments returned against him, and that he had been denied reasonable notice of the charges ultimately tried. In answer

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[3] Ohio Rev. Code §2907.10 (1953).

[4] Ohio Rev. Code §2907.20 (1953).

to these allegations, Respondent introduced a transcript of the proceedings which had resulted in Petitioner's conviction (R. 72).

The transcript disclosed the following: At the commencement of Petitioner's "trial" on March 23, 1962, the court requested Petitioner to acknowledge the fact that he had signed written waivers of his right to a jury trial. Petitioner complied with the court's request (R. 20-21). The court then related that defense counsel had agreed that the two indictments in which Petitioner was named as Defendant be consolidated for trial (R. 21). Further conversation regarding the manner in which the "trial" was to be conducted followed:

> Mr. Ergazos:[5] The only thing is, Your Honor, this matter is before the court on a prima facie case.
>
> The Court: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the State can't be taken by surprise, the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it, the State has a contest, we want to know in fairness to them so they can put on complete proof.
>
> Mr. Ergazos: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in connection with this crime I would like to reserve the right to cross-examine.
>
> The Court: That is raising another . . . that is putting the State on the spot and the court on the spot, I won't find him guilty if the evidence is substantial.
>
> Mr. Ergazos: We have a jury question in the court, undoubtedly there will be . . .

[5] Petitioner's court-appointed attorney.

The Court: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.

Mr. Ergazos: That is correct.

The Court: And the court knowing that and the Prosecutor knowing that, instead of having a half a dozen witnesses on one point they only have one because they understand there will be no contest.

A. I would like to point out in no way am I pleading guilty to this charge.

The Court: If you want to stand trial we will give you a jury trial.

A. I have been incarcerated now for the last eighteen months in the county jail.

The Court: You don't get credit for that.

A. For over two months my nerves have been . . . I can't stand it out there any longer, I would like to be tried by this court.

The Court: Make up your mind whether you require a prima facie case or a complete trial of it.

Mr. Ergazos: Prima facie, Your Honor, is all we are interested in.

The Court: All right.[6]

At the conclusion of this colloquy, opening statements were waived, and the "trial" proceeded (R. 22). The State attempted to have its first witness identify a check which had been marked as State's Exhibit A for identification.

[6] (R. 21-22).

Defense counsel objected to any testimony regarding the exhibit, but before any reason was stated for the objection, the court interrupted counsel and demanded, "Are you trying the case on the merits or just want the State to make a prima facie case?" (R. 23). Defense counsel did not respond to the inquiry. Instead, the prosecutor advised the court that there were typographical errors in the indictment and he moved to amend counts one and two of the forgery and uttering indictment by changing the number and amount of the check described in those counts. Over objection of defense counsel, the motion to amend was granted (R. 23-24). The State was also permitted to amend counts three and four of the forgery and uttering indictment by changing the number of the check allegedly forged and uttered (R. 25-26). Counts five and six were also amended with respect to the number and amount of the check described (R. 26). But even the amended charges did not correspond to the description of the check ultimately introduced in support of counts five and six. The State found it necessary further to amend those charges by changing the name of the payee (R. 32-33). Before taking the State's last motion to amend under consideration (R. 35, 38), the court expressed some vexation:

> The Court: Whoever made this up certainly made [fol. 25] some blunders, the court can emphatically say they are not material and can't be amended. In all cases whether a matter of forgery, the instrument was forgery, the description incidentally . . . but the description should be corrected . . . at least explained for identification purposes. Now, this is the exhibit . . . .[7]

[7] (R. 33).

At the conclusion of the "trial," the court granted th State's motion to amend the amended charges contained i counts five and six (R. 52). Defense counsel's objections t each of the amendments were uniformly rejected.[8]

At the conclusion of the testimony of Doris Jones, co-defendant called as the State's second witness, the prose cutor made the following statement:

> If it please the Court, Mildred Haag took a statemen off of the other defendant, Ronald Mitchell and I believ there has been shown here a conspiracy which woul permit this into evidence and I have it marked a State's Ex. "E". I have this and I have called Mis Haag to come in and testify as to her taking . . . observe Mildred Haag's signature here at the botto of the statement and I recognize this as her statemen I was also present at the time of taking the statement

Defense counsel's objection to admission of the statemen was heard and rejected (R. 39). The statement, purportedl taken from Mitchell on February 3, 1961, after Mitche had been arrested, contained admissions that Mitchell an Petitioner had broken into a building occupied by the Bea con Box Company on October 10, 1960; that they ha stolen checks and a check writer from the office of Beaco Box; that the checks and check writer had been taken t a motel room; that Doris Jones had filled in the checks and that Mitchell and Petitioner had then cashed the check at various places in and around Canton (R. 59-67). Th statement also indicated that Mitchell, upon request of th prosecutor participating in the interrogation, had signe

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[8] (R. 24, 25, 26, 32, 33, 35, 38, 52).

[9] (R. 39).

the shorthand notes that had been taken during the interrogation (R. 70). Mitchell, who had already been convicted of the offenses charged, was not called to testify.

When the State concluded its presentation, the court dismissed the seventh and eighth counts of the forgery and uttering indictment because the State had failed to present the check described in those counts—the only counts which had not been amended (R. 53). Defense counsel's motion for dismissal of the remaining counts was overruled (R. 53). Explaining its ruling, the court stated:

> Now coming to the indictment #18101 charging breaking and entering and grand larceny, there isn't any question there was a breaking and entering and the testimony of the co-conspirator Robert Mitchell, there isn't any question about his testimony which definitely makes the defendant present at the crime and guilty of that count. And as to all the evidence in this case the court finds the defendant is guilty of the second count of grand larceny. Besides this, in going to the question of guilt, of course, the court states on matters of law the statute allows such as flight, failure of the defendant to take the stand in his own defense, and all other matters that are legally competent to be considered.[10]

The prosecutor then asked that sentence be pronounced. Defense counsel advised the court that Petitioner had been in Springfield Mental Hospital "for a considerable period of time," that he had no recollection of the events which had given rise to the indictment, and that he had attempted to help himself during the period of his hospitalization

[10] (R. 54).

(R. 55). Unmoved by counsel's remarks, the court responded:

> He may have helped himself but his attitude in standing trial on these cases is nothing more than just taking a flier. He knew he was just taking it, the court certainly knows he was just taking a flier, he never expected to be acquitted, something else is back of it.
>
> There seems to be a rumor or understanding in the county jail or by one of the defendants, they haven't got a chance to get out of the pen or Mansfield, whichever they are sentenced to, if they plead guilty, by that admission there is no chance whatever, but where they stand trial they still have a chance of another trial and some court comes along and weakly, as the Supreme Court of the United States has done given [sic] the criminal more than he is entitled to under the law. The decision of the Supreme Court of the United States was five to four, showing the split of the Supreme Court. But be that as it may the defendant saw fit to stand trial and yet failed to take the witness stand, everything involved was an attitude of evading prosecution . . . .[11]

Without further comment, the court sentenced Petitioner to a term of three to sixty years.

Upon the facts stated above, the Board of Master Commissioners recommended that the writ be denied. Relying upon Ohio Rev. Code §2941.30 which allows an indictment to be amended "provided no change is made in the name or identity of the crime charged," the Master Commis-

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[11] (R. 55-56).

sioners concluded that the amendments of six counts of the forgery and uttering indictment were properly allowed. Petitioner's assertion that he had been denied a fair trial by an arrangement which precluded him from contesting the State's case by cross-examination or any other means was summarily dismissed. Although the facts upon which the assertion was predicated were not denied, the Master Commissioners had the following explanation of those facts:

> The circumstances of which petitioner now complains arose from his own acts . . . . It [the record] further shows that petitioner although he did not plead guilty agreed that all the State had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses. This was acquiesced in by his counsel. In effect he said I won't plead guilty but if the state can prove a prima facie case, I won't contest it. It was analogous to a nolo contendere with an additional element requiring the state to prove a prima facie case.[12]

The Supreme Court of Ohio, with two judges dissenting, adopted the views of the Master Commissioners. It found that "petitioner acquiesced" (R. 77) in the arrangement which allowed the state to prove only a prima facie case. Alternatively, the court stated that Petitioner had agreed that he would not contest the state's case and that there would be no cross-examination of the state's witnesses, and that "his counsel acquiesced" (R. 79) in the arrangement. The court characterized the procedure adopted as "similar to the plea of *nolo contendere* with an added condition that the state prove the prima facie case." The procedure was

[12] (R. 75-76).

viewed by the court as a "middle ground" between a ple of not guilty and a plea of guilty. Since Petitioner ha chosen that procedure by rejecting "a complete trial befor a jury," the court held that he could not contend that h had been denied a fair trial (R. 82). Petitioner was ordere remanded to custody (R. 90).

Summary of Argument

I.

A. *Loss of Petitioner's right to contest the State's cas by cross-examination or by other means.* Because Petitione exercised his fundamental constitutional right to plead no guilty (R. 74, 77, 79, 81), he was entitled to all of the con stitutional safeguards customarily accorded a defendant i a criminal case, including the right to contest the State's cas by cross-examination or by oth r means. Petitioner's court appointed attorney, acting without Petitioner's consent, en tered into an arrangement with the State pursuant to whic arrangement the State was required to prove no more tha a prima-facie case (R. 21-2). This arrangement barre Petitioner from contesting the State's case by any means including cross-examination of the State's witnesses (R 21-2). During the subsequent hearing, there was no cross examination of any of the State's witnesses even thoug eighteen months had elapsed between the date of the al leged incidents and the date of the trial. Moreover, th State tendered as evidence against Petitioner a highly in criminating transcript of an extra-judicial interrogation o an alleged co-conspirator (R. 39, 58-70) which interrogatio had occurred some four months after the alleged incidents Although the transcript was obviously inadmissible, *Doug las* v. *Alabama,* 380 U.S. 415; *Pointer* v. *Texas,* 380 U.S

400, it was accepted as evidence (R. 39), and the trier of fact specifically referred to it as evidence of Petitioner's guilt (R. 54). Manifestly, Petitioner was prejudicially stripped of his constitutional right to contest the State's case by any means, including the constitutional right of cross-examination.

B. *Absence of waiver.* Although Petitioner waived his state constitutional right to a jury trial, at no time did he expressly relinquish or abandon his federal constitutional rights. Nor can a waiver be inferred from silence for the reason that Petitioner was not silent. Indeed, he expressly rejected the arrangement of a prima facie case by insisting, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). Thereafter, forced by the trial judge to choose between a contested *jury* trial (with attendant delay and additional pre-trial confinement) and a no-contest, bench hearing, Petitioner again insisted on his rights by demanding that he be *tried* by the court (R. 22). Having twice insisted on his rights, it was unnecessary for him to insist a third time on peril of waiver. See *Glasser* v. *United States,* 315 U.S. 60, 72. The conclusion of the court below that Petitioner waived his rights is unsupported by the record and is utterly irreconcilable with the well-settled presumption against waiver of fundamental rights. *Johnson* v. *Zerbst,* 304 U.S. 458, 464.

C. *Retrospectivity.* Petitioner's conviction became final before this Court applied to state criminal proceedings the Sixth Amendment rights to confrontation and cross-examination. However, there is no substantial problem of retrospective application in the instant case. Because the rights to confrontation and cross-examination are "implicit in the concept of ordered liberty," *Pointer* v. *Texas,* 380 U.S. 400,

408 (concurring opinion by Harlan, J.), they are a part of the due process of law to which Petitioner was entitled under the Fourteenth Amendment. Alternatively, because confrontation and cross-examination are essential to "exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer* v. *Texas, supra* at 404, they bear directly on "the very integrity of the fact-finding process," *Linkletter* v. *Walker,* 381 U.S. 618, 639, and retrospective application is required.

II.

A. *Prejudice manifested by the trial judge (the trier of fact).* Because the trial judge was the trier of fact, it was absolutely essential to a fair hearing that he not pre-judge the case. By stating at the outset of the hearing that Petitioner "admits his guilt" (R. 21) the fact-finder did prejudge the case and thereby deprived Petitioner of a fair hearing. *In re Murchison,* 349 U.S. 133; *Juelich* v. *United States,* 214 F.2d 950 (5th Cir. 1954). The sole fact-finder's expression of belief in guilt was more subversive of fair trial than the conduct proscribed by this Court in *Rideau* v. *Louisiana,* 373 U.S. 723; *Irvin* v. *Dowd,* 366 U.S. 717; and *Tumey* v. *Ohio,* 273 U.S. 510.

Equally subversive of fair trial was the fact that, during the sentencing procedure, the trial court stigmatized Petitioner's plea of not guilty as "just taking a flier" (R. 55). Moreover, the trial judge stated that, in his opinion, Petitioner's exercise of his constitutional right to plead not guilty, *Rideau* v. *Louisiana, supra* at 726, was frivolous, motivated by an improper desire to seek appellate review, and indicative of an attitude of unrepentance (R. 55-56). By thus excoriating Petitioner, the trial judge unconstitutionally penalized Petitioner for exercising his constitu-

tional rights, the trial judge clearly demonstrated his own bias and prejudice, and the trial judge deprived Petitioner of a fair hearing. See *United States* v. *Wiley,* 278 F.2d 500, 504 (7th Cir. 1960).

B. *Unreasonable inference of guilt drawn from silence.* The trial judge, in his capacity as sole fact-finder, stated that he had considered as evidence against Petitioner the "failure of the defendant to take the stand in his own defense" (R. 54). Thereafter, Petitioner's attorney explained that, as a result of taking alcohol and benzedrine, Petitioner had "no recollection of these events" (R. 55). This uncontradicted explanation left no room for an inference of guilt, and such an inference was impermissible and unfair. See *Stewart* v. *United States,* 366 U.S. 1; *Grunewald* v. *United States,* 353 U.S. 391. Nevertheless, the trial judge continued to insist that silence was evidence of guilt (R. 56). Because this insistence was arbitrary and unreasonable, see *United States* v. *Romano,* 86 Sup. Ct. 279; *Tot* v. *United States,* 319 U.S. 463, Petitioner was denied a fair hearing.

III.

Petitioner was denied a fundamental safeguard guaranteed every defendant in a criminal prosecution, state or federal—the right to reasonable notice of the charges upon which he was tried. Charged by indictment with having forged and uttered certain specifically described checks, Petitioner entered a plea of not guilty. At the commencement of trial, Petitioner's court-appointed attorney agreed that he would not contest the State's case. In the proceeding that followed, the State introduced *no* evidence in support of the specific charges contained in the indictment. Instead,

the State was permitted, over objection, to amend the indictment by changing the description of the checks upon which the charges were predicated. The checks introduced were substantially different from those described in the indictment. They bore different numbers and were payable for different amounts. One of the checks introduced was different with respect to name, amount, and name of payee.

In these circumstances, Petitioner was not apprised of the offenses upon which he was tried until after the trial had commenced. He was deceived and misled by the indictment filed. He was denied the opportunity to present a defense, to plead intelligently, and to have a fair hearing. Convictions obtained upon the amended charges are violative of the due process provision of the Fourteenth Amendment.

ARGUMENT

I.

Petitioner Was Unconstitutionally Precluded From Contesting the State's Case by Cross-Examination or by Other Means.

A. Petitioner Was Stripped of His Constitutional Right to Contest the State's Case by Cross-Examination or by Other Means.

"I would like to point out in no way am I pleading guilty to this charge" (R. 22) (emphasis added). This unequivocal statement by Petitioner, the entry of pleas of not guilty (R. 74, 77), and the assertions by the court below that Petitioner did not plead guilty (R. 79, 81) establish beyond cavil that Petitioner exercised the most fundamental constitutional right of an accused in a criminal case—the right

to plead not guilty, *Rideau* v. *Louisiana*, 373 U.S. 723, 726, the right without which all other constitutional rights in a criminal case would be a sham and a mockery. Because he did not plead guilty, Petitioner was entitled to all of the constitutional rights customarily granted a defendant in a criminal case including the fundamental right to contest the State's case by cross-examination or by other means. *Douglas* v. *Alabama*, 380 U.S. 415; *Pointer* v. *Texas*, 380 U.S. 400; *In re Oliver*, 333 U.S. 257, 273; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (dictum). That Petitioner was stripped of this right is manifest from the record.

After Petitioner pleaded not guilty, his court-appointed (R. 12-13) attorney entered into an arrangement with the trial court and the State (which arrangement, as we argue below, was without Petitioner's consent and against his expressed wishes) that the State was required to prove no more than a prima facie case (R. 21-2). This arrangement, as explicitly stated by the trial judge and the court below, barred Petitioner from contesting the State's case by any means (R. 21-2, 79, 81) including the falsehood-exposing mechanism of cross-examination. See *Pointer* v. *Texas*, 380 U.S. 400, 404.

After the arrangement was made, there was a taking of testimony (we cannot fairly call it a trial). One of the State's witnesses, Ronald Keith Mitchell, did not testify in person. At the time of Petitioner's hearing, Mitchell was in an Ohio penal institution (R. 39). In spite of the fact that the record discloses absolutely no reason for the State's failure to produce Mitchell, the State offered as evidence against Petitioner the transcript of an extra-judicial interrogation of Mitchell (R. 39, 58-70). The transcript was tendered on the theory that Mitchell's statement was that

of a co-conspirator (R. 39). If the statement had been made during and in furtherance of a conspiracy involving Petitioner, it would have been admissible against him both under the general law of evidence, *Fiswick* v. *United States*, 329 U.S. 211, 217; McCormick, Evidence §244, at 521-22 (1954), and under the Ohio law of evidence. *Goins* v. *State*, 46 Ohio St. 457, 463, 21 N.E. 476, 478-79 (1889). However, because Mitchell's statement was not made until February 3, 1961 (R. 59), it could not have been made during and in furtherance of an alleged transaction which, according to the State's own evidence, ended about October 10, 1960 (R. 23, 27, 41, 43, 45, 61). Therefore, the statement was clearly inadmissible as hearsay, *Fiswick* v. *United States, supra; Sparf* v. *United States*, 156 U.S. 51, 56; *Neighbours* v. *State*, 121 Ohio St. 525, 529, 169 N.E. 839, 840 (1930), for the reason that "it secured to the state the advantage of the evidence of [Mitchell] that the defendant had participated in the crime, without the state incurring the risk incident to the cross-examination of [Mitchell]". *State* v. *Neighbours, supra* at 529, 169 N.E. at 840. This reason for inadmissibility is, of course, the very reason underlying the constitutional right to cross-examination. *Douglas* v. *Alabama*, 380 U.S. 415, 418-20. Consequently, not only was the statement inadmissible as hearsay, it was, more importantly, inadmissible on constitutional grounds.

When the statement was offered into evidence, Petitioner's attorney objected on the ground that Mitchell was available and that he should have been produced as a witness (R. 39). The objection was overruled and the statement was accepted into evidence (R. 39). The statement related to burglary, larceny, forgery, and uttering; it was the only "direct evidence" linking Petitioner to a breaking, an entry, and a theft; it was the only "evidence" that a

breaking and entry took place at night as required by Ohio Rev. Code §2907.10; and the trial judge specifically referred to the statement as evidence of Petitioner's guilt (R. 54). In view of these facts, the constitutional error in admitting the statement, *Douglas* v. *Alabama, supra; Pointer* v. *Texas, supra,* must be regarded as prejudicial. *Douglas* v. *Alabama, supra* at 419.

In addition to Mitchell's statement, there was testimonial evidence. However, because of the arrangement already referred to, not a single witness was cross-examined (R. 25, 38, 41, 42, 44, 48, 49, 52). Moreover, the trial court indicated that defense objections to testimony would be viewed with disfavor (R. 23). Bearing in mind that it was impossible to cross-examine Mitchell's erroneously admitted statement, the entirety of the State's case went untested. Although eighteen months had elapsed between the date of the alleged incidents and the date of the trial, there was not even an attempt to test the State's case either by counter-questioning or by the offering of evidence (R. 53).

The very absence of a contest makes it impossible for us to demonstrate that a contest would have proved fruitful. However, such a demonstration is not a prerequisite to an argument of prejudice. As this Court observed in *Alford* v. *United States,* 282 U.S. 687, 692:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

See also *Rosenberg* v. *United States,* 360 U.S. 367, 371; *Jencks* v. *United States,* 353 U.S. 657, 667-8; LAW AND

TACTICS IN FEDERAL CRIMINAL CASES 195-6 (Shadoan ed. 1964). We conclude, therefore, that Petitioner was prejudicially stripped of his constitutional right to contest the State's case by cross-examination or by other means.

Our conclusion is not at odds with the decision below. The court did not hold that Petitioner's rights were preserved. Rather, it admitted that they were lost, but it held that Petitioner had agreed to the loss (R. 79, 81, 82). This holding is utterly unsupported (indeed, it is flatly refuted) by the record.

B. THE COURT BELOW ERRONEOUSLY HELD THAT PETITIONER HAD WAIVED HIS CONSTITUTIONAL RIGHT TO CONTEST THE STATE'S CASE BY CROSS-EXAMINATION OR BY OTHER MEANS.

The assertions by the court below that Petitioner waived his constitutional rights appear to involve three assumptions: (1) that, at the outset of the trial, Petitioner himself expressly agreed to give up his rights (R. 79, 81); (2) that Petitioner himself impliedly agreed to give up his rights by not accepting the trial court's offer of a jury trial (R. 82); and (3) that Petitioner's rights were waived by the unilateral conduct of his court-appointed attorney (R. 81-2). Not one of these assumptions finds an iota of support either in the record or in the federal case law. We consider first the assumption that the Petitioner expressly waived his rights.

At the beginning of the proceedings, Petitioner's attorney (and not Petitioner himself) stated that "this matter is before the court on a prima facie case" (R. 21). That the attorney did not intend his statement to constitute a waiver of cross-examination is apparent from the attorney's effort to reserve the right of cross-examination (R. 21). However,

the trial court stated that an agreement to a prima facie case would preclude both cross-examination of the State's witnesses (R. 21), and any other contest of the State's case (R. 21-2). We do not contend that this statement was unclear. To the contrary it was an explicit statement that Petitioner would be barred from asserting fundamental rights deriving from his plea of not guilty. If, at this point in the proceedings, Petitioner had affirmatively indicated that he was willing to relinquish the safeguards ordinarily granted a defendant who pleads not guilty, he could not now complain.[1] But he did not so indicate. Perceiving that he was about to lose his constitutional rights, he responded, "I would like to point out *in no way* am I pleading guilty to this charge" (R. 22) (emphasis added). Reason does not permit Petitioner's response to be construed as "an *intentional relinquishment or abandonment* of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (emphasis added), amounting to a waiver of his constitutional rights. Petitioner's statement was not a manifestation of assent but a clear rejection of the arrangement suggested by his attorney. Indeed, it was viewed as a rejection by the trial judge who responded to Petitioner's statement with, "If you want to stand trial we will give you a jury trial" (R. 22). Beyond question, the record flatly refutes the assumption of

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[1] *Patton* v. *United States*, 281 U.S. 276, 286 (defendants "personally assented" to trial by eleven jurors); *Diaz* v. *United States*, 223 U.S. 442 (confrontation and right to be present; defendant expressly consented to trial *in absentia*); *Reynolds* v. *United States*, 98 U.S. 145 (confrontation; defendant procured the witness' absence); *Echert* v. *United States*, 188 F.2d 336 (8th Cir. 1951) (defendants expressly accepted a jury selected in their absence); *Burns* v. *Sanford*, 77 F. Supp. 464 (N.D. Ga. 1948) (defendant waived his right to confrontation by personally signing a stipulation of testimony); *United States* v. *Barracota*, 45 F. Supp. 38 (S.D. N.Y. 1942) (defendant Barracota voluntarily left the trial; defendant Crisci expressly consented to trial *in absentia*).

the court below that, at the outset of his trial, Petitioner expressly waived his rights.

Equally refuted by the record is the assumption that Petitioner impliedly gave up his rights by not accepting the trial court's offer of a jury trial. Petitioner had been in pre-trial confinement for over two months (R. 22). See Petition for Writ of Certiorari, p. 18. He had waived his State constitutional right to a jury apparently in order to obtain an earlier trial date (R. 22). Confronted with the trial court's statement about a jury trial, Petitioner *continued* to insist on his rights by stating, "I would like to be *tried* by this court" (R. 22) (emphasis added). The trial judge, heedless of the fact that Petitioner was insisting on his trial rights, then demanded that Petitioner choose either a "complete trial" (*i.e.*, a contested trial before a jury) or a "prima facie case" (*i.e.*, a non-contest hearing before the court) (R. 22). Petitioner's attorney (not the Petitioner himself) interjected, "Prima Facie, Your Honor, is all we are interested in" (R. 22), and the matter was abruptly terminated without further exploration of Petitioner's views (R. 22).

From the absence of further insistence by Petitioner, the court below concluded that Petitioner had intentionally relinquished his rights. This conclusion runs counter to the repeated statements by this Court and others that every reasonable presumption must be drawn against the waiver of constitutional rights and against acquiescence in the loss of fundamental rights, a presumption that is as vitally applicable to the instant case as it is to cases involving such other fundamental protections as the privilege against self-incrimination, *Escobedo* v. *Illinois,* 378 U.S. 478, 490; *id.* at 499 (dissenting opinion); *Smith* v. *United*

States, 337 U.S. 137, 150; the right to counsel, *Doughty* v. *Maxwell,* 376 U.S. 202; *Johnson* v. *Zerbst, supra;* the right to be present, *Evans* v. *United States,* 284 F.2d 393, 395 (6th Cir. 1960); and the right to be free from unreasonable search and seizure, *Judd* v. *United States,* 190 F.2d 649, 651 (D.C. Cir. 1951). See *Rucker* v. *United States,* 280 F.2d 623, 625 (D.C. Cir. 1960) (confrontation; *semble*). Indeed, neither the right to counsel nor the right to be present can have any real meaning if, as happened in the case at bar, an accused is stripped of his right to contest the State's case. *Cf. Julian* v. *United States,* 236 F.2d 155 (6th Cir. 1956).

Had Petitioner remained totally silent in the face of an affirmative and unequivocal waiver by his attorney of fundamental protections, it might be argued that he could not repudiate his attorney's conduct. In such a case, some courts would infer from the absence of objection either that Petitioner had waived his rights or that he had acquiesced in waiver.[2] Whether this inference is consistent with the strong presumption against waiver of constitutional rights need not be determined. Even if the inference is accepted, it does not support the opinion below for the reason that, in the case at bar, Petitioner *did* object. In no federal case that we have found has it even been remotely suggested that objection was irrelevant. To the contrary,

[2] *Diaz* v. *United States, supra* (confrontation; defense counsel introduced hearsay documents parts of which were favorable to defendant); *Wilson* v. *Gray,* 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 86 Sup. Ct. 288 (confrontation; defense counsel agreed to the admissibility of hearsay documents); *Cruzado* v. *Puerto Rico,* 210 F.2d 789 (1st Cir. 1954) (confrontation; defense counsel agreed to trial on the transcript of co-defendant's trial; the transcript contained cross-examination). *But cf., People* v. *Nowak,* 372 Ill. 381, 24 N.E. 2d 50 (1939) (confrontation; defense counsel stipulated all of the State's case).

in many federal cases the court carefully pointed out that there was no objection, *Wilson* v. *Gray,* 345 F.2d 282, 287 (9th Cir. 1965), *cert. denied,* 86 Sup. Ct. 288; *United States* v. *Joseph,* 333 F.2d 1012, 1013 (6th Cir. 1964), *cert. denied,* 379 U.S. 915; *Cruzado* v. *Puerto Rico,* 210 F.2d 789, 791 (1st Cir. 1954), thereby emphasizing the importance of objection and hinting broadly that it would be impermissible to find a waiver in the face of an objection.

To hold, as the court below did, that Petitioner voluntarily relinquished his rights by not continuing to insist that they be preserved is to fly in the face of all federal decisional law. In the instant case, Petitioner had already objected twice (R. 22). If an accused who is an attorney need object but once, *Glasser* v. *United States,* 315 U.S. 60, 72, surely two objections should suffice in the case of an accused who is a layman. The conclusion of the court below that Petitioner both expressly and impliedly waived his rights is unsupported by the record. Indeed, as we asserted earlier, it is flatly refuted by the record.[3]

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[3] Even if Petitioner had personally assented to a prima facie case in response to the trial court's demand that he make up his mind (R. 22), the result would be unchanged. As noted above, Petitioner waived his state constitutional right to a jury apparently in order to obtain an earlier trial date and to avoid prolonged pre-trial confinement in the county jail (R. 22). This waiver was made pursuant to Ohio Rev. Code §2945.05 (1953), and it was beyond the power of the trial court to reject the waiver. *State* v. *Frohner,* 150 Ohio St. 53, 87, 80 N.E. 2d 868, 885 (1948). In response to Petitioner's statement that he was in no way pleading guilty, the trial court stated, "If you want to stand trial we will give you a *jury* trial" (R. 22) (emphasis added). In effect, the trial court erroneously told Petitioner that his only alternatives were (1) a contested trial before a jury with attendant delay and additional pre-trial confinement (R. 22) or (2) a no-contest hearing without a jury. That Petitioner did not adopt the second alternative is apparent from his statement "I would like to be *tried* by this court" (R. 22) (emphasis added). See dissenting opinion

The statement by the court below that "agreements, waivers and stipulations made by . . . counsel [of accused persons] in their presence . . are . . . binding and enforceable upon such persons. . . ." (R. 81-2), suggests, as the third assumption underlying the court's holding, that a waiver, binding on Petitioner, was effected by Petitioner's attorney. However, such an alternative is illusory. Constitutional rights are personal rights. If a suspect refuses to consent to an otherwise unconstitutional search, his attorney, if present, cannot properly authorize the search; if a defendant refuses to testify in his own behalf, his attorney cannot force him to the witness box; and if an accused wants to plead not guilty, his attorney cannot enter a guilty plea for him. Consequently, to say that a waiver by counsel is binding on the client is merely to rephrase the rule, considered above, that a court may, in some instances, infer from the accused's silence that he acquiesces in his attorney's conduct. Whatever the merits of the rule in a case involving silence, the rule can have no application in a case involving objection. *Cf. Glasser* v. *United States, supra.* Because the record in the case at bar abundantly demonstrates that Petitioner insisted on his trial rights, it was manifestly incorrect for the court below to conclude either that Petitioner had personally waived his rights or that counsel had effected a waiver for him. The judgment of the court below should be reversed.

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below (R. 87). But even if Petitioner had personally adopted the second alternative, the adoption would have been coerced by the erroneous threat of additional delay and confinement. Because the very essence of waiver is volition, *Moore* v. *Michigan*, 355 U.S. 155, 162-65, such an adoption or acquiescence could not constitutionally be taken as a waiver.

C. The Constitutional Right to Contest the State's Case by Cross-Examination or by Other Means Presents no Problem of Retrospective Application.

Although Petitioner's conviction became final before this Court decided *Douglas* v. *Alabama*, 380 U.S. 415, and *Pointer* v. *Texas*, 380 U.S. 400, there is no problem of retrospective application in the instant case. On the date of his trial, Petitioner had a *Fourteenth Amendment* due process right to contest the State's case by cross-examination of the State's witnesses. In *In re Oliver*, 333 U.S. 257, decided fourteen years before Petitioner's trial, this Court, in reversing a state conviction for contempt, observed that an accused's "right to examine the witnesses against him" is "basic in our system of jurisprudence." *Id.* at 273. A similar due process analysis was accorded the right to cross-examination in *Greene* v. *McElroy*, 360 U.S. 474, 496-97, decided almost three years before Petitioner's trial. But of even greater significance are the statements of Justices Harlan and Stewart, concurring in *Pointer*, that "a right of confrontation is 'implicit in the concept of ordered liberty,'" 380 U.S. at 408, and that the right "to cross-examine the prosecutor's living witnesses is 'one of the fundamental guarantees of life and liberty . . . .'" *Id.* at 410. We conclude, therefore, that, on the date of his trial, Petitioner had a Fourteenth Amendment due process right to contest the State's case by cross-examination of the State's witnesses.[4]

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[4] We are aware of the two unfortunate assertions in *Stein* v. *New York*, 346 U.S. 156, 195, *overruled on other grounds*, *Jackson* v. *Denno*, 378 U.S. 368, that there is no right of confrontation protected by the Fourteenth Amendment and that this Court so held in *West* v. *Louisiana*, 194 U.S. 258. However, these assertions should be rejected for three reasons: (1) They were based upon an incorrect reading of *West* v. *Louisiana*, *supra*. In *West*, this

Should this court choose to reach the question whether *Douglas* and *Pointer* apply retrospectively to all State criminal trials, the result we urge above would be unchanged. A consideration of the nature and purpose of cross-examination brings the instant case well within the rationale *for* retrospective application of *Tehan* v. *United States,* No. 52, U.S., Jan. 19, 1966, and *Linkletter* v. *Walker,* 381 U.S. 618.

In *Linkletter,* this Court held that because the search and seizure exclusionary rule had "no bearing on guilt," 381 U.S. at 638, non-application to certain cases would not jeopardize "the very integrity of the fact-finding process." *Id.* at 639. In *Tehan,* an identical analysis was accorded the no-comment rule of *Griffin* v. *California,* 380 U.S. 609. However, the right involved in the instant case—the con-

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Court held that the *Sixth Amendment* rights of confrontation and cross-examination were not applicable to state trials. It did not hold that there was no *Fourteenth Amendment* right. Indeed, it undertook a Fourteenth Amendment analysis of the problem and it held that the right had not been violated by the introduction into evidence of a deposition taken in the accused's presence and with cross-examination. That this holding is also sound Sixth Amendment doctrine is apparent from *Douglas* v. *Alabama, supra* at 418; *Pointer* v. *Texas, supra* at 407; *Motes* v. *United States,* 178 U.S. 458, 474. (2) The assertions in *Stein* were unnecessary to the decision. In *Stein* the prosecution introduced into evidence the confessions of two co-defendants who were then being tried with one Wissner. Because the confessions referred repeatedly to Wissner and because the trial court refused to order the references deleted, the specific issue concerned the efficacy of the court's instruction to the jury that the confessions were not admissible against Wissner. See Brief for Wissner, p. 17, *Stein* v. *New York, supra.* Accordingly, there really was no issue of confrontation or cross-examination. (3) The assertions in *Stein* were made without regard to *In re Oliver, supra;* they must be treated as tacitly overruled by *Greene* v. *McElroy, supra;* and they must be regarded as tacitly disavowed in the concurring opinions in *Douglas* and *Pointer.*

stitutional right to contest the State's case by cross-examination—is manifestly related to the integrity of the fact-finding process because it is the primary mechanism for "exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer* v. *Texas, supra* at 404. It is, therefore, an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* at 405. Accordingly, if there is a problem of retrospective application, it should be resolved in favor of application just as it was resolved in favor of application in cases involving an indigent's right to counsel (which right, without a right to contest the State's case would, indeed, be hollow), an indigent's right to a trial transcript, and an accused's right to be free from coercive police interrogation practices. See Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79-84 (1965).

Resolution of the problem in favor of application will (if we prevail on our argument that Petitioner's rights were unconstitutionally violated) result in Petitioner's release. However, the State will not be barred from re-trying him. In any subsequent trial we must anticipate that the constitutional standards of confrontation and cross-examination will be complied with and their underlying purposes served. Hence, the instant case is beyond the scope of the statement in *Linkletter, supra* at 637, that "we cannot say that [the purpose of the exclusionary rule] would be advanced by making the rule retrospective." See also *Tehan* v. *United States, supra* at 8.

Moreover, resolution of the problem in favor of application will have no deleterious effect on the administration of justice. In *Linkletter, supra* at 637-38, this Court,

stressing the fact that the exclusionary rule is unrelated to guilt, deemed it unwise to impose upon the administration of state criminal justice the burden of "hearings [which] would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated." In the instant case, however, no special hearing would be required. But even if a special hearing were required, the rights to confrontation and cross-examination are so essential to the accuracy of the guilt-finding process, *Pointer* v. *Texas, supra* at 404, that any burden would be more than justified.

Finally, resolution of the problem in favor of application would in no way penalize the State for relying on prior decisions of this Court. Compare *Tehan* v. *United States, supra* at 6-7; *Linkletter* v. *Walker, supra* at 636-37. In the instant case there is no counterpart to *Twining* v. *New Jersey,* 211 U.S. 78; *Adamson* v. *California,* 332 U.S. 46; or *Wolf* v. *Colorado,* 338 U.S. 25, upon which the State could have relied. Because we have already made this point in our Fourteenth Amendment argument, we will not repeat it here. We do note, however, that the court below *did not rely* on any prior decision by this Court. The court below held not that the Sixth Amendment rights were inapplicable to a state proceeding, but that the Petitioner had waived his rights. It follows, therefore, that the reliance aspect of *Tehan* and *Linkletter* has no application to the case at bar. However, even if there had been a counterpart to *Twining, Adamson,* or *Wolf* in the case at bar and even if the court below had relied on it, the result should be no different. As we read *Tehan* and *Linkletter,* the significant questions are whether the constitutional right involved serves to assure the integrity of the guilt-

finding process and whether the purposes underlying the constitutional right can be fulfilled by retrospective application. Because the answer to each of these questions in the instant case is "yes," the make-weight of reliance is irrelevant. Consequently, if this Court deems it necessary to decide the problem of retrospective application, it should decide in favor of application.

II.

Petitioner's Hearing Was Fundamentally Unfair. The Trial Judge Manifested Prejudice by Pre-judging the Case and, in Imposing Sentence, by Excoriating Petitioner for Exercising His Constitutional Right to Plead Not Guilty. Moreover, the Trial Judge Arbitrarily and Unreasonably Inferred From Petitioner's Silence That Petitioner Was Guilty.

A. The Trial Judge (the Trier of Fact) Manifested Prejudice by Pre-judging the Case and, in Imposing Sentence, by Excoriating Petitioner for Exercising His Constitutional Right to Plead Not Guilty.

At the outset of Petitioner's hearing, the trial judge stated his understanding of the scope and effect of a prima facie case:

> The Court: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect *admits his guilt* and wants the state to prove it.
>
> Mr. Ergazos: That is correct.
>
> (R. 21-2) (Emphasis added.)

Thereby the trial court pre-judged the case and stripped Petitioner of his undeniable constitutional right to a fair hearing before an impartial and unbiased judge. *In re Murchison*, 349 U.S. 133; *Tumey* v. *Ohio*, 273 U.S. 510.

Had the case at bar been tried to a jury it might be argued that a judge's private expression of guilt, not communicated to the jury, was not inconsistent with fundamental fairness. *Sheppard* v. *Maxwell*, 346 F.2d 707 (6th Cir. 1965), *cert. granted*, 86 Sup. Ct. 289. But the case at bar was not tried to a jury. At the time he asserted that Petitioner had admitted guilt, the trial judge knew that a jury had been waived and that he, the trial judge, would be the trier of fact (R. 20-21). It was, therefore, essential to a fair trial that he be free from prejudice and that he abjure "a fixed anticipatory judgment." *State ex rel. Pratt* v. *Weygandt*, 164 Ohio St. 463, 469, 132 N.E. 2d 191, 195 (1956). Any bias or prejudice entertained by him could not conceivably have been neutralized by the fairness of other fact-finders because there were no other fact-finders.

The trial judge's statement that Petitioner had admitted guilt was, for all purposes, equivalent to an anticipatory and constitutionally impermissible statement by all twelve jurors in a jury trial that the accused was guilty. *Juelich* v. *United States*, 214 F.2d 950 (5th Cir. 1954). The belief of the sole fact-finder in the case at bar that Petitioner had admitted his guilt in open court was more subversive of fair trial than the publicized information in *Irvin* v. *Dowd*, 366 U.S. 717, 725-26, that the defendant had *offered* to plead guilty; it was more subversive of fair trial than the opinion of eight jurors in *Irvin* that the defendant was guilty, *id.* at 727-28; it was more subversive of fair trial than the televised extra-judicial confession in *Rideau* v. *Louisiana*,

373 U.S. 723, 725, which had been seen by three jurors; it was more subversive of fair trial than the judge's financial interest in *Tumey* v. *Ohio,* 273 U.S. 510, 532, which interest was not shown to have been attended by preconception of guilt; it was more subversive of fair trial than the impermissible evidence of propensity in *Maestas* v. *United States,* 341 F.2d 493, 495-96 (10th Cir. 1965); *Lane* v. *Warden,* 320 F.2d 179, 186 (4th Cir. 1963), *cert. denied,* 368 U.S. 993; and *Paschal* v. *United States,* 306 F.2d 398, 399-401 (5th Cir. 1962); see also *Rogers* v. *United States,* 304 F.2d 520, 523 (5th Cir. 1962); *McFadden* v. *United States,* 63 F.2d 111 (7th Cir. 1933); and it was at least as subversive of fair trial as the judge-grand jury procedure in *In re Murchison,* 349 U.S. 133. The constitutional error is manifest.

Equally manifest is the constitutionally impermissible prejudice displayed by the trial judge during the sentencing procedure. Petitioner's most fundamental right in a criminal case was the right to plead not guilty. See *Rideau* v. *Louisiana,* 373 U.S. 723, 726. He exercised that right (R. 74, 77). Then, during the sentencing procedure, the trial judge brazenly stigmatized the exercise of that right as "just taking a flier" (R. 55). It was apparently the trial judge's position that the constitutional right to plead not guilty was to be exercised sparingly; that it was to be exercised only if an accused had reason to expect an acquittal; that the Petitioner could not reasonably have expected an acquittal (given that the sole fact-finder had pre-judged Petitioner's guilt and that Petitioner had been stripped of his right to contest the State's case, this assuredly was true); and that his exercise of a fundamental right was therefore frivolous, motivated by an improper desire to seek appellate review, and indicative of an attitude of un-

repentance (R. 55-56). Thereupon the trial judge imposed multiple sentences to imprisonment for a total of 3-60 years, some of the sentences to run consecutively (R. 14-17).

By excoriating Petitioner for exercising his constitutional rights, the trial judge unconstitutionally penalized Petitioner, *cf. United States* v. *Wiley*, 278 F.2d 500, 504 (7th Cir. 1960); *People* v. *Moriarty*, 25 Ill. 2d 565, 185 N.E. 2d 688 (1962), and thereby served notice on the whole world that the assertion of constitutional rights would, in his courtroom, be met with judicial hostility. We do not urge that the trial judge should have been soft or tender-hearted. We do insist that, at the very least, he should have been impartial, detached, and neutral. But neutral he was not. Upon hearing his harangue, Petitioner must have felt like the football player who found that he had been clipped by the referee.

Petitioner had been stripped of almost every constitutional right preserved by a plea of not guilty. In fact he was left with but the hollow shell of his plea. It is a supreme irony of the instant case that even the shell was then thrown in Petitioner's face.

That the trial judge found Petitioner not guilty on counts seven and eight (R. 53) is irrelevant and can in no way mitigate the prejudice demonstrated by the trial judge both in his capacity as sole fact-finder and in his capacity as judge. The findings were made before, and had no relation to, the demonstration of prejudice during the sentencing procedure (R. 55-56). Moreover, the findings were compelled by the peculiar arrangement already referred to. Pursuant to the arrangement, the trial judge was required to acquit if, as happened (R. 53), there was a total failure

of proof by the State. That he did acquit upon total failure of proof establishes only that he was willing to adhere to the arrangement. Nor is it necessary for us to demonstrate that the result of the instant case necessarily would have been different absent prejudice. *Tumey* v. *Ohio*, 273 U.S. 510, 535. Petitioner had an absolute constitutional right to a fair hearing before an unbiased fact-finder. "To perform its function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136. See also *Rideau* v. *Louisiana*, 373 U.S. 723, 727; *Smith* v. *United States*, 360 U.S. 1, 17 (concurring opinion). Because Petitioner was denied not only the appearance of justice but also the substance of it, the judgment of the court below should be reversed.

B. The Trial Judge (the Trier of Fact) Arbitrarily and Unreasonably Inferred From Petitioner's Silence That Petitioner Was Guilty.

In announcing his findings of guilt, the trial judge, the trier of fact, stated that he had considered as evidence against Petitioner the "failure of the defendant to take the stand in his own defense" (R. 54). Thereafter, Petitioner's attorney told the trial judge that, at the time of the alleged incidents, Petitioner had been taking benzedrine, that he had been drinking heavily, and that he had "no recollection of these events" (R. 55). The trial court had absolutely no basis for rejecting this uncontradicted (R. 55) explanation. Nevertheless, the trial court did reject it and reiterated that silence was evidence of guilt (R. 56).

Whether or not guilt is a reasonable inference to be drawn from silence, the inference cannot constitutionally be called to the attention of the fact-finder. *Howell* v. *Ohio*,

381 U.S. 275; *Griffin* v. *California,* 380 U.S. 609. Regrettably, this Court's decision in *Tehan* v. *United States,* No. 52, U.S., Jan. 19, 1966, precludes us from urging that the no-comment rule of *Griffin* be applied to the instant case. However, *Tehan* cannot be read as barring inquiry into the reasonableness and fairness of the inference.

The inference of guilt drawn by the trier of fact in the case at bar was unreasonable and unfair. Indeed, it was far more destructive of fair trial than the conduct of the prosecutor in *Stewart* v. *United States,* 366 U.S. 1, and *Grunewald* v. *United States,* 353 U.S. 391. In each of these cases, this Court deemed unfair a prosecutor's cross-examination of the defendant regarding his failure to testify in a prior proceeding. Each of these cases involved a jury trial, and it was impossible for defendant to demonstrate that the jury had considered silence as evidence of guilt. In the instant case, however, the trier of fact stated explicitly that he had considered silence as evidence of guilt. In *Stewart* and *Grunewald,* silence was at least consistent with guilt, and in *Grunewald,* the jury was instructed that silence related only to credibility and not to guilt. 353 U.S. at 417. In the instant case, however, there was an explanation for silence. Not only was the explanation consistent with innocence, it left no room for an inference of guilt. The explanation was in no way contradicted or impeached by the State. There was no reasonable basis for rejecting it.

If, by statute, the Ohio legislature had provided that the defendant's failure to testify created an inference of guilt even though silence derived from alcoholic or narcotic amnesia, the statutory inference could not be upheld as reasonable and fair. *United States* v. *Romano,* 86 Sup. Ct. 279;

Tot v. *United States,* 319 U.S. 463. The inference drawn by the fact-finder in the case at bar is equally unreasonable and unfair, and the judgment of the court below should be reversed.

III.

Petitioner's Hearing Was Fundamentally Unfair. Petitioner Was Denied Fair and Reasonable Notice of the Charges on Which He Was Tried and He Was Denied Fair and Reasonable Opportunity to Defend Against Those Charges.

Petitioner was charged by indictment with having forged and uttered four separate instruments. Each of the instruments was described as a check. Each was specifically identified by number, amount payable, date written, and names of maker and payee. At trial, only three instruments were produced by the State. None matched the specific descriptions of the checks set out in the various counts of the indictment. The check introduced in support of counts one and two bore a different number and was made payable for a different amount than the check described in those counts. The identifying number of the check set forth in counts three and four was different from that on the check introduced in support of those counts. The check introduced as evidence of the offenses charged in counts five and six bore virtually no resemblance to that described in the indictment. It was written for a different amount identified by a different number, and made payable to a different payee. No check whatsoever was produced by the State to establish the offenses charged in counts seven and eight, and the court was compelled to acquit Petitioner of the charges contained in those counts.

Despite the State's failure to establish Petitioner's guilt of any of the specific offenses charged in the indictment, Petitioner was convicted. His convictions were rendered possible solely by the willingness of the trial court, over objection, to permit the State to amend the indictment to conform to its proof. By permitting the State to try Petitioner for offenses other than those with which he was charged, the trial court denied Petitioner a fundamental protection guaranteed by due process of law—the right to notice of the charges against him. *Cole* v. *Arkansas,* 333 U.S. 196. The right of an accused in all criminal prosecutions "to be informed of the nature and cause of the accusation," specifically guaranteed by the Sixth Amendment, has been described by this Court as one of the "safeguards essential to liberty in a government dedicated to justice under law." *Id.* at 202. It is a safeguard constitutionally required in all criminal prosecutions, state or federal. *In re Oliver,* 333 U.S. 257, 273.

The Supreme Court of Ohio did not suggest in the instant case that the requirement of notice was inapplicable. It held, however, that the requirement was satisfied by advising the accused of the name of the crime with which he was charged:

> The indictments presently before us were for forgery and uttering a forged instrument. They were complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering, which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment, is a matter of form, not of substance, and in no way affects the nature or identity of the offense as charged (R. 78).

It is impossible to reconcile this view with the primary function of an indictment or any other pleading by the State. An indictment must sufficiently apprise the defendant of the charges against him to enable him to prepare to meet those charges. *Russell* v. *United States,* 369 U.S. 749, 763; *Cole* v. *Arkansas, supra.* To achieve that purpose, it is not sufficient for the indictment to charge an offense in generic terms; "'but it must state the species,—it must descend to particulars.'" *United States* v. *Cruikshank,* 92 U.S. 542, 558. Here, the indictment did "descend to particulars." But when the trial started, the particulars were immediately abandoned. Petitioner was tried on charges drastically different from those contained in the indictment. The vulnerability to constitutional attack of convictions for offenses not charged is apparent. "Conviction upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 290 U.S. 353, 362.

It is as much a violation of due process to try a man on charges never made as it is to affirm his conviction on charges never tried. *Cole* v. *Arkansas, supra.* The variance between indictment and proof is no less offensive where the evidence introduced is relevant to particular offenses completely different from those charged, than it is where the jury is permitted broader scope than an indictment would warrant. *Stirone* v. *United States,* 361 U.S. 212. The disadvantage to the accused arising from amendment at trial of the specific charges of the indictment is at least as great as that which arises from inadequate information in the indictment. *Russell* v. *United States, supra.*

Amendment of an indictment for forgery and uttering by changing the description of the instrument allegedly

forged and uttered would obviously be impermissible in a federal court. See *Ex Parte Bain,* 121 U.S. 1. One basis for the federal rule is the Fifth Amendment requirement of indictment by grand jury without which requirement the rights of an accused would be "at the mercy or control of the court or prosecuting attorney." *Id.* at 13. Were this requirement the sole basis for prohibiting a substantial amendment of a federal indictment, application of a similar prohibition to state prosecutions would raise a serious question. See *Hurtado* v. *California,* 110 U.S. 516. But the Fifth Amendment is not the sole basis for the federal rule. *Stirone* v. *United States, supra.* A second, and equally important basis, valid in state as well as federal prosecutions, is reasonable notice. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . " *In re Oliver,* 333 U.S. 257, 273. Reasonable notice is not afforded where the prosecution is permitted to charge one offense and prove another. *Stirone* v. *United States, supra.* The right of the accused "to be heard in his defense" is devoid of any significance if the accused is not afforded reasonable opportunity to prepare his defense. *Powell* v. *Alabama,* 287 U.S. 45, 71. Meaningful preparation is hardly possible where the accused is not apprised of the specific charges he must meet until after his trial has commenced.

The constitutional requirement of reasonable notice and an opportunity to be heard described in *Holden* v. *Hardy,* 169 U.S. 366, 389, as one of the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard," received no consideration from the court below. Relying upon

§2941.30 of the Ohio Revised Code, which allows amend ment of an indictment "provided no change is made in th name or identity of the crime charged," the court con doned the revision of the indictment allowed at trial. Sub stitution of descriptions of checks radically different fron those contained in the indictment was deemed not to affec "the nature or identity of the offense charged." Thus, fo purposes here relevant, the court has read the word "iden tity" out of the statute. So long as the name of the offens charged remains the same, any amendment would be per missible. The court's holding ignores the principle that statutory description of an offense "must be accompanie with such a statement of the facts and circumstances a will inform the accused of the specific offense, coming un der the general description, with which he is charged." *United States* v. *Hess,* 124 U.S. 483, 487; see *Skelley* v *United States,* 37 F.2d 503 (10th Cir. 1930); *United State* v. *Strauss,* 285 F.2d 953 (5th Cir. 1960). To permit whole sale amendment of criminal charges, limited solely by th requirement that the name of the offenses remain un changed, does outrage to the fundamental rule of fairnes applicable to any pleading which initiates a criminal pro ceeding—that the pleading apprise the accused, with rea sonable certainty, of the specific charges he must be pre pared to meet. *United States* v. *Simmons,* 96 U.S. 360.

Petitioner was not merely denied adequate notice of th charges upon which he was to be tried; he was affirmatively misled by the indictment filed. The indictment filed did set forth the specific facts upon which the charges were predicated. Had it not set forth those specific facts, Peti tioner would have been entitled to a bill of particulars a a matter of right pursuant to §2941.07 of the Ohio Revise

Code. He did not request a bill of particulars, nor did he need one. Had he been tried upon the offenses charged, he could not now complain of inadequate notice. But he was not tried upon those charges. Any preparation undertaken to meet those charges would have been of little value in meeting the amended charges. The injustice of the situation is enormously magnified by the peculiar circumstances of the trial. Despite Petitioner's unequivocal assertion, "I would like to point out in no way am I pleading guilty," the trial court considered that Petitioner had admitted his guilt by entering into an arrangement whereby the State's case was not to be contested (R. 21). What crimes did Petitioner admit by entering into the arrangement? If he admitted the offenses charged in the indictment, his admission was wholly uncorroborated. The state offered no evidence to demonstrate that Petitioner had committed those offenses. Apparently, then, the trial court assumed that Petitioner admitted his guilt of certain offenses bearing the same name as those charged in the indictment.

The extreme injustice of the situation is even more apparent when examined in the context of the position taken by the Supreme Court of Ohio. That court viewed the arrangement entered into by Petitioner's court-appointed attorney as "similar to the plea of *nolo contendere* with an added condition that the state prove the prima facie case" (R. 79). An assumption that the attorney acted intelligently must rest upon the further assumption that he knew the State could not prove the offenses charged; if he believed the State could "prove the prima facie case" in an uncontested proceeding, there could be no rational explanation of his waiver of his client's most fundamental constitutional rights. Indeed, the State could not "prove the prima

facie case." But the court did not require it to do so. After obtaining all the advantages derived from the no-contest plea, the State was allowed to prove offenses other than those to which that plea was deemed to have been entered.

In *Cole* v. *Arkansas, supra,* 196 U.S. at 201, this Court stated the basic proposition upon which Petitioner rests his plea:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in all courts, state or federal.

Petitioner was denied "notice of the specific charge" upon which he was tried. He was denied "a chance to be heard in a trial of the issues raised by that charge." He was denied the opportunity to prepare to meet the charges upon which he was tried and to participate effectively in the fact-finding process of a trial. He was denied information essential to enable him to plead intelligently. He was denied the most fundamental safeguards essential to a fair trial. He was denied "due process of law" within the meaning of the Fourteenth Amendment. The judgment of the court below should be reversed.

Conclusion

The function and essential elements of a criminal trial have been aptly described by Judge Thurman Arnold:

> The significance of a criminal trial in all civilized countries goes far beyond the question of public order and the enforcement of law. It embodies the notion that every man, however lowly and however guilty he

may be, is entitled to a fair and impartial trial in which he must be presumed to be innocent. What is underneath the idea of a fair trial and what are its basic elements? The first premise is that the judge must be impartial. The second is that the accused has the right to have counsel. The third is that the judgment must be based on the evidence before the tribunal and that the accused is entitled to confront and cross-examine the witnesses who testify against him. *The Criminal Trial as a Symbol of Public Morality* in CRIMINAL JUSTICE IN OUR TIME 140 (Howard ed. 1965).

Petitioner's trial was empty of those essential elements of fairness. He was not presumed innocent. He was tried by a judge who had determined his guilt before the trial even began. Although an attorney was appointed to represent Petitioner, the attorney surrendered the right to present Petitioner's position on a fundamental question of guilt or innocence at the very inception of the trial. Petitioner was denied the right to confront and cross-examine the witnesses against him. In these circumstances, the "tremendous psychological need for the appearance of justice," *ibid.*, was left entirely unsatisfied. The need for the reality of justice was equally unfulfilled.

Wherefore, it is respectfully urged that the judgment below be reversed.

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